No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMORY KEY, RICHARD MAGNUS, LEON T. McGROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellees make only two points in their brief (Points II, page 5, and III, page 15), which require notice and discussion by appellant. These two points are:

(1) "Appellant was not a service establishment because approximately half of its business was done for the government pursuant to navy contracts"; and

(2) "Appellees were not employees of a motor carrier whose duties affected safety of operations in interstate transportation."

I.

Appellant Was a Service Establishment Within the Meaning of the Fair Labor Standards Act of 1938.

Appellees carefully refrain from saying that appellant was not engaged in the business of rendering services, as that term is used in the Fair Labor Standards Act of 1938 (29 U. S. C. A., Section 213(a)(2).) The allegations of appellees' complaint, the findings of the Court and the evidence show beyond question that appellant's sole business was the rendering of certain services to any and all members of the public desiring them. It is proper to again call this Court's attention to Finding No. IV [R. 14-15] in part, as follows:

> "That . . . since August 15, 1942, defendant (appellant) has been engaged in the business of packing, crating, storing, handling, and working on goods, wares, commodities and merchandise" of others.

The finding, *supra,* follows closely the language of the complaint. The evidence fully supports it.

The mere reading of this finding is sufficient to show that appellant did nothing except to render services to and for others, hence it was a service establishment in fact and as contemplated by the Act.

In this connection the Court found (Finding No. IV):

> ". . . the Court adopts the figures arrived at on an average taken from an analysis of the defendant's (appellant's) records presented in the defendant's

testimony, which showed 55⅓ per cent intrastate and 44⅔ per cent interstate business." [R. 15.]

It thus appears, first, that all of appellant's business was servicing and, second, that 55⅓ per cent of such business was *intra*state. This being true, the service establishment exemption contained in Section 13(a)(2) of the Act (29 U. S. C. A., Section 213(a)(2)) was applicable, since said section provides:

> "The provisions of Sections 206 and 207 of this title (29 U. S. C. A.) shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

What, then, is the real contention of the appellees in respect to the service establishment exemption claimed by appellant? It seems to be this: that because appellant rendered services to hundreds, perhaps thousands, of men in the Navy in the packing, crating, hauling, storing and transporting of their household goods and personal effects, under a contract with the Navy Department, appellant thereby ceased to be a service establishment within the meaning of the Act. We assert that this contention is demonstrably unsound.

II.

Appellant Did Not Cease to Be a Service Establishment Because a Portion of Its Servicing Was Done for Navy Personnel Under a Contract With the Navy Department.

Appellees erroneously stated that "approximately half of its (appellant's) business was done for the government . . ." Upon this erroneous statement they premise their subsequent argument and conclusion. What are the facts?

World War II involved the movement of millions of men, and in many instances, their families and their household goods and effects, from one part of the country to another and to and from foreign countries. Within prescribed limits, the Government paid for the transportation of these men and their families and for the packing, hauling, handling, storing and transportation of their household goods and effects. The Navy Department, of course, provided for the rendition of such services to its personnel. *This constituted a part of their total compensation from the Government.*

The contracts entered into between the Navy Department and appellant [See Defendant's Exhibits E, F, G, H, I and J] provided that appellant should render services to and for individual members of Navy personnel, and where loss or damage to goods occurred, appellant was responsible to such personnel, not to the Government. The "General Specifications" of the contract [Exhibit I] provide in this behalf:

> "Section 20, *Contractor's Responsibility.*
>
> "The Contractor shall be responsible to the *owner* of any effects over which it has control or custody under this contract for any and all loss or damage to such effects while in its control or custody. . . .

> "In addition, the Contractor shall be responsible to the *owner* of any effects which it handles pursuant to this contract for any and all loss or damage to such effects resulting from the Contractor's improper performance under this contract. . . .
>
> "For any loss or damage for which the Contractor is responsible hereunder the Contractor shall make prompt payment to the *owner* of the effects lost or damaged." (Italics ours.)

The "General Specifications" (Section 18) of the contract further provide:

> "When effects are hauled under a Government order at Government expense to the Contractor's warehouse for storage at the *owner's* expense, there shall be no charge to the Government for handling or terminal charges in or out of such warehouse. The warehouse receipt and the contract given the *owner* shall comply with this provision." (Italics ours.)

These and other provisions of the contract show that it was made primarily, indeed exclusively, for the benefit of the men in the Navy. Thus it was, in law and in fact, a third party contract, as clearly evidenced by the provisions thereof making appellant liable to the owner, that is to say, to any individual member of Navy personnel whose goods were serviced by appellant. (See 17 C. J. S. 1121 *et seq.; California Civil Code,* Section 1559; *Garratt v. Baker,* 5 Cal. (2d) 745, 748, and cases cited.)

It is said in 17 C. J. S. 1121:

> "The prevailing view in the United States permits a third person for whose benefit a contract was made to sue thereon even though he is a stranger to the contract and the consideration therefor."

Numerous Federal cases, as well as State cases, are cited in footnote 3 (*id.*) in support of the text.

In *Garratt v. Baker,* 5 Cal. (2d) 745, the Supreme Court of California said, at page 748:

> "A third party may enforce a contract where he shows that he is a member of a class of persons for whose benefit it was made (citing cases)."

See, also, 17 C. J. S., 1134, stating that:

> "Except as statute may provide otherwise, it is not necessary that the contract be for the exclusive benefit of the third person to enable him to sue thereon."

An excellent statement in reference to a third party contract is made in 6 Cal. Jur. 471, where the authors say:

> "It (the rule) does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, *establishes a privity,* and implies the promise and obligation on which the (third party) action is founded. While such a contract remains unrescinded, *the relations of the parties are the same as though the promise had been made directly to the third party.*" (Italics ours.)

Reference to the evidence shows that appellant did no servicing whatsoever for the Government. All servicing under its contract with the Navy Department was done by appellant for individuals, who were members of Navy personnel.

Typical of this servicing is the following example: A naval officer is transferred from California to the Atlantic Seaboard; appellant's employees take a pick-up truck to the officer's house in Los Angeles, with boxes, barrels,

and packing materials; these employees pack dishes, silverware, household goods and personal effects into these boxes, barrels, etc., and haul the same to appellant's warehouse, where these boxes and barrels are marked or stenciled, and loaded into railroad freight cars, or motor trucks, for interstate shipment, and are delivered to the interstate carrier. Or, the order might be the reverse, that is appellant would receive an interstate shipment of such goods from an interstate carrier for delivery to the naval officer at his residence in Los Angeles, whereupon the goods were loaded into appellant's trucks, transported to such residence, placed therein in the manner and to such extent as the officer's wife might direct.

These services were of a personal or individual character, and were rendered to the officer himself, not to the Government. Such services were not rendered in bulk, but always for a particular individual, each such individual being wholly separate and apart from all others. Obviously, the example of servicing stated, *supra,* affords no basis whatever for appellees' claim that such servicing was for the Government.

It is worth noting that appellees do not mention a single instance where Government or Naval goods were serviced under the contract in question, nor can they do do.

Appellees argue at some length (their brief, pp. 5-14) that appellant's servicing was not of a retail character, *i. e.,* not with or for the consumer, but rather of a wholesale character; hence, they say, it does not come within the provisions of the service exemption set forth in Section 13(a)(2) of the Act (29 U. S. C. A., Section 213(a)(2).) The fallacy of the argument is demonstrated by the very nature of the services rendered, as above set forth—such services in every instance being at retail, that is, for the individual owner of the goods.

It is true that some Courts have held that the service establishment contemplated by the act is one that, somewhat like a retail store, serves customers indiscriminately as a business and performs work or labor on the person or property of the customer. This holding was pointed out and the cases cited in appellant's opening brief (pp. 10-13). Other decisions, however, hold that the rendition of service to industrial and commercial consumers, as distinguished from individual consumers, does not make such establishment any the less a service establishment. (See *Lonas v. National Linen Service Corp.,* 136 F. (2d) 433, 150 A. L. R. 697-Pet. for Cert. denied 320 U. S. 735, 64 S. Ct. 157, 88 L. Ed. 472; *Hunt v. Nat'l Linen Sev. Corp.,* 178 Term 262, 157 S. W. (2d) 608; Anno. 150 A. L. R. 700, 701.) Under the facts of this case, however, it is immaterial whether the latter type of servicing shall, or shall not, hereafter be held within the exemptive provisions of the Act, since it cannot be denied that appellant's business was to serve any and all members of the public requiring its servicing, and that the servicing done under the Navy contract was for individual members of the public.

The cases cited by appellees on this point are not applicable to the case at bar.

In *Consolidated Timber Co. v. Womack,* 132 F. (2d) 101, this Court held that the operation of cookhouses by a logging concern, at cost, for the convenience of its employees, and not to serve the public, was not within the service exemption of the Act. There is an obvious distinction between that case and the instant case.

In *Walling v. Sondock,* 132 F. (2d) 77, the Court (5th Circuit) held that the furnishing of guards and watchmen by a detective agency to commercial and industrial

establishments did not bring the agency within the service exemption, apparently because the concerns to which services were rendered were not of a retail character. The Court stated no reasons for its conclusion other than that it was "upon the authority of *Kirschbaum v. Walling,*" 316 U. S. 517. But, the latter case merely held that the owners of loft buildings, which were leased to tenants engaged in the production of goods for interstate commerce, were not entitled to claim the service exemption. The following language of the Court explains its decision (*id.* p. 526):

> "Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by petitioners here is not intrastate commerce."

Appellees insist that *Roland Electrical Co. v. Walling,* 326 U. S. 657, 66 S. Ct. 413, is decisive of the point in question. In that case, however, the facts recited by the Court show that 99% of the company's 1000 accounts were with industrial or commercial firms (*id.* p. 661), for whom the company did "commercial and industrial wiring" (*id.* p. 678). The Court said of these customers:

> "These are not retail customers in the same sense as is the customer of the local merchant, local grocer or filling station operator who buys for his own personal consumption." (*Id.* p. 678.)

No such situation is presented here. The individual members of Naval personnel whose goods were serviced are analogous to the customers of the retail merchant—they are individuals, as distinguished from commercial and industrial concerns, and it was their personal and individual goods that were serviced by appellant, not goods in bulk, not goods of the Government or of the Navy.

III.

Appellees Were Employees of a Motor Carrier and Engaged in Activities, a Substantial Part of Their Time, Involving Safety of Operations in Interstate Commerce.

Appellees concede that appellant was, at all times involved in this action, a motor carrier within the meaning of the Motor Carrier Act of 1935 (49 U. S. C. A. 304), and that appellant's business was both intrastate and interstate. The Court found that 44⅔ per cent of appellant's business was interstate. [Finding No. IV, R. 14-15.] Under these and other facts of the case, there can be no doubt that the Interstate Commerce Commission had the jurisdiction and power to regulate appellant in respect to the "qualifications and maximum hours of service of (its) employees (appellees), and safety of operation and equipment." (49 U. S. C. A., Section 304(a)(1).) This being true, the provisions of Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Section 207) were not applicable to appellees, as clearly shown by Section 13 of said Act (29 U. S. C. A., Section 213(b)) which provides:

> "The provisions of Section 207 of this title (Title 29 U. S. C. A.) shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49."

The gist of appellees' contention, *i. e.,* that appellees were not engaged in activities involving safety of operations in interstate commerce, appears to be: (1) that the trial court found that none of appellees devoted a substantial part of his activities to such operations; (2) that the Act is subject to strict construction against those claiming

the exemption; (3) that appellant has the burden of showing as to each appellee that he engaged each week, a substantial part of his work time, in such operations; and (4) that appellant has failed to meet that burden.

In its opening brief (pp. 19-20) appellant set forth the various activities of the employees of motor carriers which the Interstate Commission and the Courts have held to bring such employees within the regulatory powers of the Commission, as provided in 49 U. S. C. A., Section 304(a)(1). These are:

(1) Drivers of motor trucks;

(2) Drivers' helpers;

(3) Loaders who load, unload, or transfer freight between motor vehicles;

(4) Mechanics who work on such vehicles used in interstate commerce;

(5) Checker or Terminal Foreman doing or directing the loading of freight for interstate motor carrier; and,

(6) Yard drivers and their helpers, mechanics, and loaders who perform work involving safety of operations and equipment, including those who inspect and remedy defects in trailers.

We believe these also include packers and craters of goods for shipment by motor truck in interstate commerce, since the manner in which goods are packed and crated in boxes, crates, and other containers will certainly affect other procedures such as loading, handling, and transporting them.

Since the filing of appellant's opening brief, the Supreme Court of the United States has decided the case of *Morris v. McComb,* 92 L. Ed. (Adv. Op.) 83, originally

instituted as *Walling v. Morris* (6 Cir). The Supreme Court stated the questions involved therein as follows (*id.* p. 85):

> "The first question is whether the Interstate Commerce Commission has the power, under Sec. 204 of the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce,* are distributed generally, throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate commerce.* The other question is whether, if the Commission has that power, the overtime requirements of Sec. 7 of the Fair Labor Standards Act of (June 25) 1938 apply to such employees in view of the exemption stated in Sec. 13(b)(1) of that Act. We hold that the Commission has the power in question and that the overtime requirements of Sec. 7 of the Fair Labor Standards Act therefore do not apply to such employees."

The Court said that it granted certiorari limited to the following question (*id* p. 86):

> "2. Where such employees (*i. e.,* those of a common carrier for hire who conducts a general cartage business) during a minority of their time are engaged in the transportation of interstate traffic are

they exempt under the provisions of Section 13(b)(1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U.S.C. Sec. 301, *et seq.*)?"

The nature and extent of the several phases of the cartage service rendered by the motor carrier are stated by the Court as follows (*id* p. 87):

"He was prepared to and did render general cartage service to the general shipping public. In 1941, he rendered such service to 47 consigning firms, but about 97% of his revenue came from the Great Lakes Steel Corporation and the Michigan Steel Corporation, both in Ecorse. His general cartage services, in 1941, were made up of three intermingled types of service, generally classifiable as follows on the basis of the revenue derived from them: (1) 35%: Transportation of steel largely within steel plants. This was transported for further processing in those plants and an unsegregated portion of it was shipped ultimately in interstate commerce. (2) 61%: Transportation between steel mills and industrial establishments. These shipments consisted principally of bumper stock, fender stock and other types of steel used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce. (3) 4%: Transportation of miscellaneous freight directly in interstate commerce,

> either as part of continuous interstate movements or of interstate movements begun or terminated in metropolitan Detroit."

The most striking part of the Court's decision is, that only 3% to 4% of the employees' activities were in interstate commerce and this was held to be substantial and sufficient under the Motor Carrier Act to bring such employees within the jurisdiction of the Interstate Commerce Commission, and likewise to exempt such employees from the wage and hour provisions of the Fair Labor Standards Act. This holding completely sustains the position taken by appellant in its opening brief (pp. 20-21) that character of activities, as distinguished from time spent by the employee therein, determines whether an employee is engaged in work involving safety of operations in interstate commerce.

The decision in the *Morris* case, *supra,* negatives appellees' contention that it was necessary for appellant to show that each "employee was exempt in any work week." (Appellees' Br. p. 20.) In this connection the Court said (*id.* p. 90):

> "However, apparently in the normal operation of the business, these strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. These trips were thus a natural, integral and apparently inseparable part

of the common carrier service of the petitioner and of his drivers.

"One or more such trips were taken by one or more drivers each week. The average number of drivers making one or more such trips in each week was nine drivers out of 37, or 24.4%. There were six weeks in which more than half of the drivers thus engaged directly in interstate commerce. The highest percentage of drivers making such trips in one week was 78.1%, when 25 drivers, out of the 32 then on duty, did so. As to the distribution of such trips, throughout the year, among the total of 43 drivers, every driver, except two, made at least one such trip with interstate freight." (Italics ours.)

The italicized language just quoted is too clear to be misunderstood. It shows that "one or more such trips (that is, trips carrying interstate freight) by one or more drivers each week" was sufficient to include all of the carrier's 43 drivers within the exemption, where it also appears that the drivers throughout the year shared indiscriminately the duty of driving on such trips.

It thus appears that very little activity in work involving safety of operations, within the meaning of 29 U. S. C. A., Section 213(b)(1) and 49 U. S. C. A., Section 304(2), is required to bring an employee so engaged within the exemption under discussion. But for the holding in the *Morris* case, *supra,* the *de minimis* rule might be invoked as to such activities.

Of importance also is the fact that in the *Morris* case the carrier did not transport freight across State lines.

(See footnote 7, *id.* p. 87.) The carrier's interstate transportation (4% of the total) was "freight directly in interstate commerce, either as part of continuous movements or of interstate movements begun or terminated in metropolitan Detroit." (*id.*) In footnote 7 (*id.*) these movements in metropolitan Detroit are described as being:

> "Wholly within the boundaries of the State of Michigan," and the carrier's work as "involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation between the defendant and such other interstate carriers."

The last quoted language aptly fits appellant's interstate activities, found by the Court to constitute 44⅔% of its total business. [Finding IV, R. 14-15.]

There is little point and no merit whatever in appellees' contention that they were not full time drivers in interstate commerce, the implication being that because of that fact the *Morris* case is not applicable. The decisive point is, that under that decision an employee who spends 4% of his time in driving a motor truck in the transportation of goods in interstate commerce is exempt from the provisions of the Fair Labor Standards Act. And what is true of a driver is equally true of the other classes of employees mentioned and set forth, *ante*.

A. Detailed Activities Showing That Appellees Engaged in Work Involving Safety of Operations in Interstate Commerce.

Appellees assert that appellant must have established that each appellee devoted a substantial part of his time to activities directly affecting safety of operations of motor vehicles in interstate transportation, and that appellant has failed to sustain that burden. (Appellees' Br. pp. 16-20.) Appellees' own statement of those activities (Br. p. 17) is too sketchy and incomplete to be of any value to the Court.

In its opening brief (pp. 24-28) appellant set forth detailed activities of appellees sufficient, we believe, to show conclusively that they were engaged in safety of operations in interstate commerce. If that statement seems somewhat incomplete, it must be remembered that, because of the destruction of many of its records by a fire and a change of management, appellant was at a disadvantage through no fault of its own. It submitted to the best of its ability the records of each employee for the time involved in this action. At the risk of repetition, and in the hope that these interstate activities may be made to appear more plainly to the Court, the same are again set forth by groups, classified as Drivers and Helpers; Loaders and Unloaders; Packers and Unpackers, and Craters; Mechanics and their Helpers.

(1) Drivers and Drivers' Helpers.

The record shows the following appellees were drivers or drivers' helpers: Emory Key, [R. 84] 10% of time;

Earl Graham [R. 175-176] 3 days a week for 4 months; Joseph Sevedra [R. 188] 9 months; George W. Peterson [R. 189]; Louie Vaughn [R. 198, 202] full time 8 weeks, 10% to 15% of time thereafter; Leon T. McRossen [R. 204, 209] 10% to 15% of time; Noble F. White [R. 216, 217] part of time, remainder loading and unloading; David Garcia [R. 218-220] all the time; Richard Magnus [R. 230] 15% of time; Sidney H. Smith [R. 269] for 4 months, then trucking (driving) to Long Beach. Of the 18 appellees, 10 are thus shown to have been drivers. In addition, some of the 10 performed duties of loaders or unloaders.

(2) Loaders and Unloaders.

The following appellees were loaders or unloaders, or both: Bert Armstrong [R. 78] on railroad cars, all in interstate commerce; Emory Key [R. 84, 86] 20% of time; Earl Graham [R. 175, 176] percentage of time not shown; Louis Kanier [R. 181] did some unloading; Thomas P. Remus [R. 183] some unloading, all interstate; Leon T. McRossen [R. 209] 5% to 10% of time; Ira C. Holder [R. 214] 20% loading and unloading; Noble F. White [R. 217], combination driver helper, loader and unloader; Richard Magnus [R. 230] 5% of time; King Fisher [R. 267] packer, mover, handler all of the time. Thus 10 of the 18 appellees engaged in loading and unloading. Some of these 10 also were drivers and drivers' helpers.

(3) Mechanics and Their Helpers.

One appellee, Harold N. Wheeler [R. 223, 225, 226], was a mechanic, and a helper, and prior thereto, oiled and greased trucks.

(4) Packers and Unpackers.

Several of the appellees who were drivers, helpers, loaders, or unloaders, also performed part time duties as packers and unpackers, hence their names are not repeated here as packers or unpackers. Only L. A. Charette [R. 236, 237] was a full time packer. We believe that a packer's duties affect safety of operations, although thus far the courts do not appear to have decided that question. But, if it be assumed that their duties do not involve safety of operations, then only one of the 18 appellees is shown by the foregoing detailed statement not to have been so engaged.

There can be no doubt that drivers, drivers' helpers, loaders, unloaders, mechanics, and mechanics' helpers, including oilers and greasers of trucks, come within the exemption of 29 U. S. C. A., Section 213(b)(1) and 49 U. S. C. A., Section 304(a). The Interstate Commerce Commission has so held and the Supreme Court has sustained the Commission. (See authorities cited in Op. Br. pp. 19-22.)

It is immaterial that some of the appellees performed duties involving safety of operations in interstate commerce only a part of their time. That was true of all of the employees involved in *Morris v. McComb*, 92 L. Ed. (Adv. Op.) 85, *supra;* such employees devoting only 4% of their total activities to safety of operations in interstate commerce. None of the appellees, save only L. A. Charette (the full time packer), failed to devote more than 5% of his time to activities involving safety of operations in interstate commerce. Most of them devoted from 10% to full time in such operations. Thus, on the facts the case at bar presents a stronger showing than was made in *Morris v. McComb, supra.*

In this connection, the evidence of Maynard Diegel, appellant's assistant secretary and manager, as detailed in the opening brief, at pages 26-28, is important as showing the distribution of driving activities of drivers in certain selected weekly periods illustrative of the whole thereof.

As in the *Morris v. McComb* case, *supra,* each and all of the appellees engaged indiscriminately in the performance of their classified duties and activities in safety of operations. The very fact that most of them performed duties in more than one class of activities is evidence of the indiscriminate nature of their work. This, too, clearly appears from the evidence of Mr. Diegel above referred to. Appellant's working force of men was too small to be otherwise.

Moreover, when it is noted that 44⅔% of appellant's business was interstate, it is reasonable to deduce that each of the appellees was engaged in activities a substantial part of his time involving safety of operations in such commerce.

In view of the foregoing facts, it is submitted that appellant has sustained any burden of proof imposed upon it by law.

For the reasons set forth in our opening brief and in this reply brief, we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

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